

(2014) 07 BOM CK 0210
In the Bombay High Court
Case No : Second Appeal No. 937 of 2007

Yeshwant Balwant Badave	Vs	APPELLANT
Yogi Rajendra Shivacharya Guru Mahadling Swami Inamdar		RESPONDENT

Date of Decision : 17-07-2014

Acts Referred:

Bombay Hindu Places of Public Worship (Entry Authorization) Act, 1956 — Section 2(a), 3, 6
Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8, 11, 9, 92
Constitution of India, 1950 — Article 14, 15, 16, 17, 21
Evidence Act, 1872 — Section 13, 57, 90
Specific Relief Act, 1963 — Section 34, 38

Citation : (2014) 5 ABR 295 : (2015) 1 ALLMR 196 : (2016) 1 BomCR 514 : (2015) 2 MhLj 291

Hon'ble Judges : R.K. Deshpande, J

Bench : Single Bench

Advocate : V.A. Thorat, Senior Advocate and S.S. Gokhale, Advocate for the Appellant; V.B. Naik, Senior Advocate, R.S. Alange and Shivshankar D. Patil, Advocate for the Respondent

Final Decision : Dismissed

Judgement

R.K. Deshpande, J.—In Regular Civil Suit No. 167 of 1985 for grant of injunction restraining the Defendant Nos. 1 to 14 perpetually from obstructing the exclusive rights of the Plaintiffs of performing puja, archa, dahibhat, abhishek and other pujas etc before the deity Shri. Shambu Mahadeo, Amruteshwar and the other deities of Shikhar Shingnapur Devsthan as priest and to take income of the same and claiming permanent injunction restraining the Defendants from using the said rights unauthorisedly, the learned Civil Judge, Junior Division, Dahiwadi has passed a decree and operative portion of the order is reproduced below:

- (1) The suit of the Plaintiffs is hereby decreed with costs.
- (2) The Defendant Nos. 1 to 11 and 14 are hereby restrained permanently from causing any kind of obstruction to the plaintiff's exclusive right of performing

puja, archa, dahibhat puja, abhishek and other pujas etc. before deities Shri Shambhu Mahadeo, Amrutheshwar and other deities of Shikhar Shingnapur temple, Tal. Man to receive the income of the same as priests.

(3) There is no any order as against the Defendant Nos. 12 and 13 since they are dead, so also as against the Defendant Nos. 15 to 17, as no any relief has been claimed against them.

2. In Regular Civil Appeal No. 43 of 1994, the learned Ad-hoc District Judge-4, Satara has by its judgment and order dated 1st September 2007 reversed the decision of the trial Court by allowing the appeal and the suit is dismissed. Hence, this second appeal by the original Plaintiffs.

3. The Appellants are the original Plaintiffs and belong to Badave community. The original Defendant Nos. 12 and 13 have died whereas no relief was claimed against the Defendant Nos. 15 to 17. It is not in dispute that the Defendant No. 17 Chhatrapati Udayan Raje Bhosale is the owner of the suit property and has supported the claim of the Plaintiffs. The Defendant Nos. 1 to 11 and 14 belong to Lingayat community and have seriously contested the claim of the Plaintiffs. Hence, they shall be referred to hereinafter as "the contesting defendants".

4. The dispute in this appeal is between the two communities of Hindus, namely, the Badaves who are the Plaintiffs and the contesting Defendants who are the Lingayats. I have heard Mr. V.A Thorat, the learned Senior Advocate assisted by Smt. S.S. Gokhale appearing for the Appellants and Mr. V.B. Naik, the learned Senior Advocate assisted by Mr. R.S. Alange appearing for the contesting Defendants. Both the learned Senior Advocates have repeatedly urged and it is also the finding recorded by both the Courts below that the right of the Plaintiffs to perform puja, archa, abhishek, dahibhat and other pujas at the temple [hereinafter to be referred as "religious rites and rituals".] is not at all disputed, but it is the question of exclusive right of the Plaintiffs which is in dispute. The claim of the Plaintiffs is that except the Plaintiff--Badaves, neither the contesting Defendants, who belong to Jangam community nor any other person have any such right to perform all such religious rites and rituals for and on behalf of the members of their community, as are performed by the Plaintiffs. Since the contesting Defendants threatened to invade such rights of the Plaintiffs, this suit was filed for the relief of permanent injunction.

5. Before the trial Court, voluminous documents were placed on record. The Plaintiffs examined six witnesses whereas the contesting Defendants have examined seventeen witnesses. The Defendant Nos. 2 and 17 have examined one witness each. The trial Court has held that the documents at Exhibit Nos. 173, 174, 152, 134 to 136, 301, 138, 293, 294, 296, 208, 309, 168, 342, 154 to 158, 171, 149, 166, 170, 171 have been proved and the contents of it have been relied upon to hold that the Plaintiffs have established their exclusive right to perform all such religious rites and rituals. The trial Court recorded the finding that the documents at Exhibit Nos. 153, 165, 139 to 148, 151, 167 and 169 have

not been proved whereas the documents at Exhibit Nos. 307, 308, 167 and 150 are not relevant for deciding the controversy involved in the matter. The trial Court has also recorded the finding that the contesting Defendants have no such right to perform the religious rites and rituals.

6. The appellate Court has considered all these documents and has held that the documents are not pleaded, some of the documents are inadmissible in evidence, the contents of some of the documents are not proved and even if the documents are admissible in evidence or the contents of the documents are proved, they have no relevance to the controversy involved in the case and none of the documents proved/produced constitute the source of the right of the Plaintiffs. The appellate Court further held that the decisions contained in some of these documents are not binding upon the contesting Defendants. It has been held that the Plaintiffs have failed to establish their exclusive right to perform religious rites and rituals.

7. In the light of undisputed factual position and the findings recorded by the Courts below, this Court passed an order on 4th March 2008 framing the substantial questions of law and admitted the appeal. The said order is reproduced below.

1. Heard the learned Counsel appearing for the parties. Second Appeal is admitted on the following substantial questions of law:

i) Whether the appellate Court could have discarded the documents at Exhibit-173 and 174 on the ground that the contents of the said documents have not been proved?

ii) Whether the appellate Court could have discarded the document at Exhibit-173 which was of the year 1724 on the ground that the contents of the said documents are not proved especially when the presumption u/s 90 of the Indian Evidence Act, 1872 was applicable to the said document?

iii) Whether the appellate Court could have discarded various documents which were 30 years old on the ground that the contents of the documents were not proved?

iv) Whether the provisions of Hindu Places of Public Worship (Entry Authorisation) Act, 1956 are applicable to the temple in question which was owned by the Defendant No. 17?

[At the time of hearing, substituted by the following substantial question of law:]

iv) Whether the relief claimed and granted by the trial Court in the suit in question violates the provisions of section 3 of the Bombay Hindu Places of Public Worship (Entry Authorisation) Act, 1956 so as to attract the bar of jurisdiction of the civil Court contained in section 6 therein?

v) Whether the appellate Court committed an error by holding that the Appellants have not established their source of right in as much as the original

Defendant No. 17 who is claiming to be owner of the temple has admitted the existence of the right in favour of the present Appellants?

It seems that the matter had gone before the Apex Court in Civil Appeal No. 8906 of 2011 which was disposed of by directing the parties to maintain status quo in all respects. The Apex Court has expedited the decision of the second appeal and hence the matter is taken from the priority list for final hearing.

8. Mr. V.A. Thorat, the learned Senior Advocate has urged that in respect of the admissibility of the documents in evidence, what the Court is required to look into as a general principle of law is that (i) the documents are coming from the proper custody, (ii) the documents are consistent and there is absence of contemporary contradiction and (iii) the series of documents indicate a particular mode or pattern unless shown otherwise. He has urged that the decision of the trial Court that the Plaintiffs have established their exclusive right, is based upon the documents which are proved on the basis of presumption u/s 90 of the Indian Evidence Act, 1872. Undisputedly, the documents are more than 30 years old. They have come on record from the custody of the Defendant No. 17 in whose custody such documents should be, the contents of the documents are consistent with each other without any contradiction and indicate the same pattern of the right of the Plaintiffs to exclusively perform such religious rites and rituals. He, therefore, submitted that the appellate Court has committed an error of law in discarding all such documents either on the ground that the contents of it are not proved or they do not reflect the source of the right of the Plaintiffs.

9. Mr. Thorat submitted that it was necessary for the contesting Defendants to have specifically pleaded either custom or permission from the Defendant No. 17, the owner of the temple to perform such religious rites and rituals. He submitted that in the absence of any custom or permission being pleaded by the contesting Defendants, let alone proved, the Plaintiffs' right to perform such religious rites and rituals exclusively must be accepted. He further urged that the temple in question is a private temple of the Defendant No. 17 who in unequivocal terms accepted the case of the Plaintiffs and hence nothing can be done in the temple without the prior permission of the Defendant No. 17. He submitted that the Defendant No. 17 has in fact refused such permission to the contesting Defendants.

10. Mr. Thorat has invited my attention to the decision in the Civil Suit No. 49 of 1929 filed by the Plaintiffs in which a decree was passed on 12th December 1932, restraining permanently the Defendants-Kolis therein of Shingnapur not to obstruct the Plaintiff Badaves of Shingnapur in their right of taking Dahibhat, Naivedya, Maha Naivedya, Ras of grain and Lakholi along with Guptadan and to give to devotees and pilgrims, Teerth, Prasad and Angars. He has urged that said suit was filed in the representative capacity as contemplated under Order-I Rule-8 of the Code of Civil Procedure, 1908, a public notice was issued and one Shivlingaya Jangam was examined at Exhibit-154 deposing the rights of the Jangams and Kolis to worship and perform puja. Referring to the Explanation VI

u/s 11 of the Code of Civil Procedure, 1908, Mr. Thorat has urged that it constructively bars the entire community of Jangams from re-agitating the matter which was directly and substantially in issue in the earlier suit. He submitted that the principle u/s 92 of the Code of Civil Procedure, 1908 needs to be imported and applied. He submitted that the said decision is binding upon the contesting Defendants on the ground of estoppel also.

11. The reliance is placed by Mr. Thorat on the decision of the Apex Court in Tirumala Tirupati Devasthanams Vs. K.M. Krishnaiah, in which it has been held that the right to worship which was adjudicated in a suit to which the Plaintiffs in the said decision were not party, such judgment is admissible in evidence u/s 13 of the Indian Evidence Act, 1872. Inviting my attention to paragraph 19 of the Apex Court decision in Smt. Ass Kaur (Deceased) by L.Rs. Vs. Kartar Singh (Dead) by L.Rs. and Others, he urged that as and when the custom has repeatedly been recognised by the Courts, the same need not be proved and a judicial notice can be taken of such custom u/s 57 of the Indian Evidence Act, 1972. He also relied upon, for the same proposition, the decision of the Apex Court in Ujagar Singh Vs. Jeo, In support of his plea based upon the Explanation VI of section 11 of the Code of Civil Procedure, 1908 and Order-I Rule-8 of the Code of Civil Procedure, 1908 read with section 92 therein, he relied upon the decisions in the case of Rup Diamonds and Others Vs. Union of India and Others, and Singhai Lal Chand Jain (dead) Vs. Rashtriya Swayam Sewak Sangh, Panna and Others, .

12. On the question of the documents which are held to be proved by the trial Court, Mr. Naik, the learned Senior Advocate appearing for the contesting Defendants has taken me through the decision of the appellate Court and has urged that all such documents have been considered by the appellate Court. The same have been discarded on the ground that the documents are not pleaded, the contents are not proved and none of the documents disclose the source of exclusive right of the Plaintiffs to perform all such rites and rituals in the temple. He submitted that the appellate Court has gone into merits of the documents and there is appreciation and re-appreciation of the contents of it, which does not give rise to any substantial question of law, being a possible view of the matter. He submitted that both the Courts have recorded a concurrent finding of fact that the earlier decision in Civil Suit No. 49 of 1929 delivered on 12th December 1932 and the decisions given in appeal therefrom upto the second appeal by this Court, are not binding upon the contesting Defendants as they were not parties in the said litigation.

13. Mr. Naik further submitted that the decision in the Civil Suit No. 49 of 1929 does not satisfy the test of representative suit under Order-I Rule-8 of the Code of Civil Procedure, 1908 and the said suit did not claim declaration of any right muchless about the exclusive right of the Plaintiffs to perform all religious rites and rituals as has been claimed in the suit in question. According to him, it was a simpliciter suit for removal of obstruction by Koli community of Shingnapur in

exercise of the rights of the Plaintiffs, as was asserted. He submitted that it was not a suit claiming exclusive right by the Plaintiffs. He invited my attention to an application filed by the contesting Defendants in Civil Suit No. 49 of 1929 for grant of permission to intervene in the matter. The Court passed an order on the said application on 25th September 1929, which is reproduced below:

The Plaintiff gives a pursis (Exhibit-30) that he does not want to join the Applicants in the suit. From the frame of the suit, the Appellants do not appear to have any interest in this suit or any right to be joined as parties. The drafting of the notice published in a newspaper appears to be defective and has led to some misunderstanding. In fact from the frame of the suit, only Badaves and Kolis can be parties to this suit. Application is dismissed with costs.

He, therefore, submitted that the decision in the aforesaid suit cannot be said to be binding upon the contesting Defendants. He submitted that the test laid down under Explanation VI of section 11 of the Code of Civil Procedure, 1908 has also not been satisfied.

14. Relying upon the decision of the Apex Court in Anathula Sudhakar Vs. P. Buchi Reddy (Dead) by LRs. and Others, and also the provisions of sections 34 and 38 of the Specific Reliefs Act, 1963, Mr. Naik has urged that the suit in question is for grant of simpliciter injunction restraining the contesting Defendants perpetually from obstructing the rights of the Plaintiffs of performing puja, archa, abhishek, dahibhat and other puja in the temple of Shikhar Shingnapur as priest and to take income of the same. It also seeks to restrain permanently the contesting Defendants from using the said rights unauthorisedly. It is a civil right which is asserted involving the complicated and complex questions of facts and law. In such a situation, according to him, it was not permissible for the trial Court to decide the issue of title in a suit for simpliciter injunction and the proper course was to relegate the Plaintiffs to a remedy of full fledged suit for declaration and consequential reliefs. He further submitted that the suit in question is not based on any right, customary or otherwise, and it fails to disclose specifically the source of such right, the plaint is bereft of all material facts constituting such right. According to him, the appellate Court has considered all these aspects in proper perspective and the decision in appeal does not give rise to any substantial question of law.

15. In respect of substantial question of law framed at serial No. (iv), about the applicability of the provisions of the Bombay Hindu Places of Public Worship (Entry Authorisation) Act, 1956, Mr. Thorat for the Appellants-Plaintiffs concedes to the position that the temple is covered by section 2(a) of the said Act. In view of this, the said substantial question of law no longer survives for consideration. However, Mr. Naik for the contesting Defendants as urged that the right claimed in the suit is covered by section 3 of the said Act and hence the jurisdiction of the civil Court to grant any relief in such a suit is barred by law u/s 6 of the said Act. He submits that the test is to find out what is the effect of granting relief to the Plaintiffs. If grant of such relief violates section 3, then, bar u/s 6 would

operate otherwise not. Mr. Thorat for the Appellants-Plaintiffs has urged that the suit is not covered by section 3 and, therefore, the bar u/s 6 would not operate.

16. In view of the aforesaid rival submissions, by consent of the learned Counsel appearing for the parties, the substantial question at serial No. (iv) is substituted as under:

iv) Whether the relief granted by the trial Court in the suit in question violates the provisions of section 3 of the Bombay Hindu Places of Public Worship (Entry Authorisation) Act, 1956 so as to attract the bar of jurisdiction of the civil Court contained in section 6 therein?

17. Before proceeding to deal with the substantial questions of law framed in this second appeal, I would proceed to decide the other contentions raised by the learned Counsel appearing for the parties. The plaint is in Marathi and the prayer clauses are reproduced below in verbatim:

The prayer clauses (A) and (B) in the plaint can be translated in English as under:

(A) The Defendant Nos. 1 to 14 either by themselves or through anyone else should not object to the exclusive rights and customs of the entire Badaves to perform puja, archa, abhishek or dahibhat, etc. and to take dakshina offered to the deities in the temples of Shree Shambu Mahadeo Amruteshwar and Shikharshingnapur and to perpetually restrain the Defendants from performing such rights in the temple.

(B) Saddle the costs of the suit upon the Defendants.

18. Bare reading of the plaint shows that a customary or traditional right to perform the religious rites and rituals has been claimed by one community of Hindus, called Badaves, to the exclusion of all other communities. It is the averment that such right has been recognised and accepted by all, since the time immemorial or in antiquity. The cause of action for filing the suit is shown as unauthorised threat to invade such rights of the Plaintiffs on 29th and 30th September 1985 by the contesting Defendants who have no such right.

19. To deal with the contention based upon sections 34 and 38 of the Specific Reliefs Act, 1963, it has to be accepted as a principle of law that a custom is a source of law and a right based upon such custom is a customary right. Proceeding on this principle, the averments need to be seen. The Plaintiffs have unambiguously averred in the plaint that they are exercising the right to perform religious rites and rituals since the time immemorial and in antiquity, recognised and accepted by all others. The source of such right is therefore pleaded as customary law. The Plaintiffs have placed on record documentary as well as the oral evidence in support of their claim. It is well established that evidence is not required to be pleaded. The question as to whether such right is established or not, shall be dealt with subsequently.

Therefore, in the absence of the documents being pleaded in the plaint, the suit

cannot be dismissed. The lower appellate Court has committed an error of law in holding that the source of right is not disclosed in the plaint. The objection raised by Mr. Naik for the contesting Defendants is, therefore, rejected.

20. Bare reading of the plaint, including the prayers made therein, leaves no manner of doubt that the Plaintiffs are claiming a declaration that they have exclusive right to perform such religious rites and rituals and the contesting Defendants have no right to create any such obstruction in the exercise and performance of such rights by the Plaintiffs and in view of the threats given, the contesting defendants are required to be restrained perpetually from using the rights of the Plaintiffs unauthorisedly. Thus, the suit is for grant of declaration as can be claimed u/s 34 of the Specific Reliefs Act, 1963 and for the consequential relief of perpetual injunction u/s 38 of the said Act.

21. The trial Court has framed the issues and the appellate Court has framed the points for determination, including (1) whether the Plaintiffs have the exclusive right of performing the puja, aracha, abhishek, dahibhat and other pujas before the deities of Shree Shambu Mahadeo Amruteshwar and Shikharshingnapur, as prayed and to take the income therefrom, (2) Whether the contesting Defendants are causing obstruction to the rights of the Plaintiffs and the Plaintiffs are entitled to perpetual injunction as prayed for. The parties have understood the controversy involved in the matter and have led the evidence in support of their rival claims. It is not case of any party that for want of any claim for declaration, the evidence could not be led. The Courts below have recorded the findings also. In view of this, it cannot, therefore, be said that the suit in question is not claiming any declaration of right u/s 34 of the Specific Reliefs Act, 1963, or that the contesting Defendants had no notice of the claim for declaration and, therefore, such contention of Mr. Naik is rejected.

22. The substituted substantial question of law at serial No. (iv) is whether the relief as is claimed and was granted by the trial Court violates the provisions of section 3 of the Bombay Hindu Places of Public Worship (Entry Authorisation) Act, 1956 so as to attract the bar of the jurisdiction of the civil Court u/s 6 therein. Both the learned counsel have invited my attention to the decision of the Apex Court in Sastri Yagnapurushadji and Others Vs. Muldas Bhudardas Vaishya and Another, wherein the validity of the said Act was upheld on the touchstone of Article 26(b) of the Constitution of India. Before dealing with the decision in Shastri Yagnapurushdasji (supra) the position of law as has been developed by the several decisions of the Apex Court needs to be seen.

23. In the decision of the Apex Court in the The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt., while elaborating the words "of its own affairs in matters of religion" in Article 26(b), it has been observed that in contrast to secular matters relating to administration of its property the religious denomination or organisation enjoys complete autonomy in deciding as to what rites and ceremonies are essential according to the tenets of the religion they hold and no outside authority has any

jurisdiction to interfere with their decision in such matters.

24. In the case of *Sri Venkataramana Devaru and Others Vs. The State of Mysore and Others*, it has been held that though Article 25(1) deals with rights of individuals, Article 25(2) is wider in its contents and has reference to the rights of communities and controls both Articles 25(1) and 26(b) of the Constitution, though the rights recognized by Article 25(2)(b) must necessarily be subject to some limitations or regulations and one such would be inherent in the process of harmonizing the right conferred by Article 25(2)(b) with that protected by Article 26(b).

25. In *Tilkayat Shri Govindlalji Maharaj Vs. The State of Rajasthan and Others*, it has been held that the protection is given to the practice of religion and to the denomination's right to manage its own affairs in matters of religion. Therefore, whenever a claim is made on behalf of an individual citizen that the impugned statute contravenes his fundamental right to practice religion or a claim is made on behalf of the denomination that the fundamental right guaranteed to it to manage its own affairs in matters of religion is contravened, it is necessary to consider whether the practice in question is religious or the affairs in respect of which the right of management is alleged to have been contravened are affairs in matters of religion. If the practice is a religious practice or the affairs are the affairs in matters of religion, then, of course, the rights guaranteed by Article 25(1) and Article 26(b) cannot be contravened. It further holds that if the practice which is protected under the former is a religious practice, and if the right which is protected under the latter is the right to manage affairs in matters of religion, it is necessary that in judging about the merits of the claim made in that behalf the Court must be satisfied that the practice is religious and the affair is in regard to a matter of religion.

26. In the case of *Sardar Syedna Taher Saifuddin Saheb Vs. The State of Bombay*, the Apex Court has summarised the position of law and the principles underlined in the decision has been placed beyond controversy. The first is that the protection of these Articles is not limited to matters of doctrine or belief they extend also to acts done in pursuance of religion and therefore contain a guarantee for rituals and observances, ceremonies and modes of worship which are integral parts of religion. The second is that what constitutes an essential part of a religious or religious practice has to be decided by the courts with reference to the doctrine of a particular religion and include practices which are regarded by the community as a part of its religion.

27. Now coming to the decision of *Shastri Yagnapurushdasji (supra)*, it was a decision arising out the suit filed by the followers of Swaminarayana sect known as Satsangis. The suit claimed declaration that the relevant provisions of the Bombay Hindu Places of Public Worship (Entry Authorisation) Act, 1956 did not apply to their temples and an injunction was claimed restraining the Respondent No. 1 and other non-Satsangi Harijans from entering the Swaminarayan temple of Northern Diocese of Swaminarayan sect and to restrain the Respondent Nos. 2

and 3 claiming to be Mahants of temples to take steps to prevent the non-Satsangis from entering and worshiping in the said temples. The suit was decreed by the trial Court and the High Court reversed the decree of the trial Court and dismissed the suit. Against this, an appeal was carried to the Apex Court, which maintained the decision of the High Court.

28. The Apex Court has held in the said decision that the Swaminarayana sect is not distinct and separate from the Hindu religion and consequently, the temples belonging to the said sect fall within the ambit of section 3 of the said Act. The Apex Court rejected the contention that section 3 of the said Act is so wide that even actual worship of the idols which is reserved for the Poojaris and specially authorised class of worshipers, may be claimed by non-Satsangis. Para-25 of the said decision is relevant and it is reproduced below:

Besides, on the merits, we do not think that by enacting s. 3, the Bombay Legislature intended to invade the traditional and conventional manner in which the act of actual worship of the-deity is allowed to be performed only by the authorised Poojaris of the temple and by no other devotee entering the temple for darshan. In many Hindu temples, the act of actual worship is entrusted to the authorised Poojaris and all the devotees are allowed to enter the temple up to a limit beyond which entry is barred: to them, the innermost portion of the temple being reserved only for the authorised Poojaris of the temple. If that is so, then all that s. 3 purports to do is to give the Harijans the same right to enter the temple for "darshan" of the deity as can be claimed by the other Hindus. It would be noticed that the right to enter the temple, to worship in the temple, to pray in it or to perform any religious service therein which has been conferred by s. 3, is specifically qualified by the clause that the said right will be enjoyed in the like manner and to the like extent as any other Hindu of whatsoever section or class may do. The main object of the section is to establish complete social equality between all sections of the Hindus in the matter of worship specified by s. 3; and so, the apprehension on which Mr. Desai's argument is based must be held to be misconceived. We are, therefore, satisfied that there is no substance in the contention that s. 3 of the Act is ultra vires.

It has been held that section 3 of the said Act is not intended to invade the traditional and conventional manner in which the act of actual worship of the deity is allowed to be performed only by the authorised Poojaris of the temple and by no other devotee entering the temple for darshan. In many Hindu temples, the act of actual worship is entrusted to the authorised Poojaris and all the devotees are allowed to enter the temple up to a limit beyond which entry is barred to them, the innermost portion of the temple being reserved only for the authorised Poojaris of the temple.

29. In the decision of the Apex Court in the case of N. Adithayan Vs. The Travancore Devaswom Board and Others, the grievance was that the appointment of non Brahmin Santhikaran for the temple in question offends and violates the alleged long followed mandatory custom and usage of having only

Malayala Brahmins for such jobs of performing poojas in the Temples and this denies the right of the worshippers to practice and profess their religion in accordance with its tenets and manage their religious affairs as secured under Articles 25 and 26 of the Constitution of India. After taking review of the earlier decisions of the Apex Court it has been held in para-17 that consequently there is no justification to insist that a Brahmin or Malayala Brahmin in this case, alone can perform the rites and rituals in the temple, as part of rights and freedom guaranteed under Article 25 of the Constitution of India and further claim that any deviation would amount to violation of any such right guaranteed under the Constitution.

30. It is the contention raised by the learned Senior Counsel Mr. Thorat for the Appellants-Plaintiffs that the Court should take judicial notice of the fact that all along a Brahmin alone conducts the religious rites and rituals in the private and public temples and therefore a person other than Brahmin is prohibited from performing such religious rights and rituals. The Apex Court has precisely dealt with this matter in N. Adithayan (Supra) in para-17 of the judgment which is reproduced below:

¶17..... If traditionally or conventionally, in any Temple, all along a Brahmin alone was conducting poojas or performing the job of Santhikaran, it may not be because a person other than the Brahmin is prohibited from doing so because he is not a Brahmin, but those others were not in a position and, as a matter of fact, were prohibited from learning, reciting or mastering Vedic literature, rites or performance of rituals and wearing sacred thread by getting initiated into the order and thereby acquire the right to perform homa and ritualistic forms of worship in public or private Temples. Consequently, there is no justification to insist that a Brahmin or Malayala Brahmin in this case, alone can perform the rites and rituals in the Temple, as part of the rights and freedom guaranteed under Article 25 of the Constitution and further claim that any deviation would tantamount to violation of any such guarantee under the Constitution. There can be no claim based upon Article 26 so far as the Temple under our consideration is concerned. Apart from this principle enunciated above, as long any one well versed and properly trained and qualified to perform the puja in a manner conducive and appropriate to the worship of the particular deity, is appointed as Santhikaran dehors his pedigree based on caste, no valid or legally justifiable grievance can be made in a Court of Law. There has been no proper plea or sufficient proof also in this case of any specific custom or usage specially created by the Founder of the Temple or those who have the exclusive right to administer the affairs religious or secular of the Temple in question, leave alone the legality, propriety and validity of the same in the changed legal position brought about by the Constitution and the law enacted by Parliament. The Temple also does not belong to any denominational category with any specialized form of worship peculiar to such denomination or to its credit. For the said reason, it becomes, in a sense, even unnecessary to pronounce upon the invalidity of any such practice being violative of the

constitutional mandate contained in Articles 14 to 17 and 21 of the Constitution of India?

It has been held that if the traditionally and conventionally, in any temple, all along a Brahmin alone was conducting pooja or performing the job of Santhikaran, it may not be because the person other than a Brahmin is prohibited from doing so, because he is not a Brahmin, but those others were not in a position and, as a matter of fact, were prohibited from learning, reciting or mastering Vedic literature, rites or performance of rituals and wearing sacred thread by getting initiated into the order and thereby acquire the right to perform homa and ritualistic forms of worship in a public or private temple. Ultimately, in para-18, the Apex Court has held that any custom or usage irrespective of any proof of their existence in pre-constitutional days cannot be countenanced as a source of law to claim any rights when it is found to violate human rights, dignity, social equality and specific mandate of the Constitution and the law made by the parliament. No usage which is found to be pernicious and considered to be in derogation of the law of the land or opposed to public policy or social decency can be accepted or upheld by Courts in the country.

31. The Apex Court has also held in para 17 reproduced above that only a qualified person well-versed and properly trained for the purpose alone can perform poojas in the temple since he has not only to enter into the sanctum sanctorum but also touch the idol installed therein. It therefore goes without saying what is required and expected of one to perform the rituals and conduct pooja is to know the rituals to be performed and mantras, as necessary, to be recited for the particular deity and the method of worship ordained or fixed therefor. It has been held that as long as any one well-versed and properly trained and qualified to perform the pooja in a manner conducive and appropriate to the worship of the particular deity, is appointed as Santhikaran dehors his pedigree based on caste, no valid or legally justifiable grievance can be made in a Court of law.

32. The law as has been developed in several decisions of the Apex Court cited above can be summarised briefly as under:

[1] The religious denominations or organisations enjoy complete autonomy in deciding as to what rites and ceremonies are essential according to the tenets of the religion they hold and no outside authority has any jurisdiction to interfere with their decision in such matters.

[2] Article 25(2) of the Constitution of India controls the rights of the individuals and of the communities but it must necessarily be subject to some limitations and regulations and one such would be inherent in the process of harmonizing the rights conferred by Articles 25(2)(b) of the Constitution of India with that protected by Article 26(b) of the Constitution of India.

[3] If the practice is religious practice or the affairs are the affairs in the matter of religion, then, of course, the rights guaranteed by Articles 25(1) and 26(b) of

the Constitution of India cannot be contravened.

[4] The protection of Articles 25 and 26 of the Constitution of India is not limited to the matters of doctrine or belief but extend also to the acts done in pursuance of the religion and therefore contain a guarantee for rituals and observances, ceremonies and modes of worship which are integral part of the religion.

[5] Section 3 of the Bombay Hindu Places of Public Worship (Entry Authorisation) Act, 1956 does not intend to invade the traditional and conventional manner in which the actual act of worship of a deity is allowed to be performed only by the authorised poojaris of the temple and by no other devotee entering the temple for darshan.

[6] If traditionally or conventionally any one well-versed and properly trained and qualified to perform pooja in a manner conducive and appropriate to the worship of a particular deity, is appointed as Santhikaran or Poojari de hors his pedigree based on caste, no valid or legally justifiable grievance can be made in a Court of law.

[7] Any custom or usage irrespective of any proof of their existence in pre-constitutional days cannot be countenanced as a source of law to claim any rights when it is found to violate the human rights, dignity, the social equality and specific mandate of the Constitution or the law made by the Parliament.

[8] No usage which is found to be pernicious and considered to be in derogation of the law of the land or opposed to the public policy or social decency can be accepted or upheld by the Courts in the country.

[9] In judging the rival claims as guaranteed by Articles 25(1) and 26(b) of the Constitution, the Court must be satisfied that the practice is religious and the affair is in regard to the matter of religion.

[10] What constitutes an essential part of the religion or religious practice has to be decided by the Courts with reference to the doctrine of a particular religion and includes the practices which are regarded by the community as part of its religion.

33. In the light of aforesaid principles of law laid down, section 3 of the Bombay Hindu Places of Public Worship (Entry Authorisation) Act, 1956 needs to be seen and hence it is reproduced below:

3. Throwing open of Hindu temples to all classes and sections of Hindus.- Notwithstanding any custom, usage or law for the time being in force, or the decree or order of a Court, or anything contained in any instrument, to the contrary, every place of public worship which is open to Hindus generally, or to any section or class thereof, shall be open to all sections and classes of Hindus; and no Hindu of whatsoever section or class, shall in any manner be prevented, obstructed or discouraged from entering such place of public worship, or from worshiping or offering prayers thereat, or performing any religious service

therein, in the like manner and to like extent as any other Hindu of whatsoever section or class may so enter, worship, pray or perform.

The main object of section 3 is to establish complete social equality between all the sections of Hindus in the matter of worship specified by section 3. It deals with the individual as well as the community rights of entering the places of public worship, worshipping or offering prayers thereat or performing any religious service therein. Though this provision operates notwithstanding any custom, usage or law for the time being in force, it is controlled by Articles 25(2)(b) and 26(b) of the Constitution of India. It has to be read harmoniously and it cannot be construed in a manner which shall invade the guarantee of religious practice or the affairs in the matter of religion contained in Articles 25(2)(b) and 26(b) of the Constitution of India. If the practice is religious practice or the affairs are the affairs in the matter of religion, then, the rights guaranteed cannot be contravened. The religious denomination or organization enjoys complete autonomy in deciding as to what rights and ceremonies are essential according to the tenets of the religion they hold and no outsider has any jurisdiction to interfere with it.

34. Section 3 does not intend to invade the traditional, conventional or customary manner in which the actual act of worshipping of a deity is allowed to be performed only by the authorised Poojaris of the temple and by no other devotee entering the temple for darshan. The rights to enter the sanctum sanctorum, i.e., to enter the innermost sacred part of the temple where the idols are installed and to do the actual worship by touching the idols for the purpose of bathing, dressing the idols, offering the garlands and doing all other ceremonial rites prescribed by the custom, convention or tradition, are not covered by section 3 of the said Act.

35. Section 6 of the said Act deals with the limitation of the jurisdiction of the civil Court and it runs as under:

6. Limitation of jurisdiction of civil Courts. -No civil Court shall entertain or continue any suit or proceeding, or shall pass any decree or order, or execute wholly or partially any decree or order, if the claim involved in any such suit or proceeding, or if the passing of any such decree or order or if such execution would in any way be contrary to the provisions of this Act.

Section 6 bars the jurisdiction of the civil Court to entertain or continue any suit or proceeding or to pass any decree or order, or execute wholly or partially any decree or order, if the claim involved in such suit or proceeding or if the passing of any such decree or order or if such execution would in any way be contrary to the provisions of this Act. The language employed u/s 6 leaves no manner of doubt that if the relief claimed by the Plaintiffs and granted by the trial Court violates the provisions of section 3 of the said Act, then, the bar of the jurisdiction of the civil Court u/s 6 would operate. It will, therefore, depend upon the averments made in the plaint, the reliefs claimed and granted by the Court

and the facts and circumstances of the case, whether the bar created u/s 6 of the said Act operates or not.

36. As pointed out earlier, in the present case, the Plaintiffs are claiming declaration that they have exclusive right to perform such religious rites and rituals and the contesting Defendants have no right to create any obstruction in exercise and performance of such rights by the Plaintiffs. It is a customary right based upon customary law which has been claimed. The consequential relief of injunction to perpetually restrain the other community of Hindus from using the rights of the Plaintiffs unauthorisedly, has also been claimed. The trial Court has passed a decree in terms of the prayers made in the suit. The jurisdiction of the civil Court u/s 9 of the Code of Civil Procedure, 1908 is available, as the right claimed being one covered by Articles 25(2)(b) and 26(b) of the Constitution of India, and the jurisdiction of the Civil Court in the present case was not barred u/s 6 of the said Act. The substantial question at serial no. (iv) is, therefore, answered accordingly.

37. Now coming to the other substantial questions of law at serial Nos. (i), (ii), (iii) and (v) in respect of the proof of or establishing the customary and traditional rights to perform the religious rites and rituals is concerned, undisputedly the decision in the Civil Suit No. 49 of 1929 at Exhibit- 134 has attained the finality. The Regular Civil Appeal No. 70 of 1933 and the Second Appeal No. 630 of 1935 are dismissed and the judgments are at Exhibit-135 and 136 respectively. It was between the two communities of Hindus-one, the Plaintiffs herein, who are Badaves and the another community of Kolis who were the Defendants in the said suit. It was not a suit claiming an exclusive right of the Plaintiffs to perform all the religious rites and rituals, as has been claimed in the present suit. Though a public notice was issued in the said suit and the contesting Defendants filed an application under Order-I Rule-8 of the Code for being joined as the Defendants in the suit, the said application was strongly opposed by the Plaintiffs--Badaves. The Court had specifically passed an order observing that the Plaintiff (Badaves) does not want to join the contesting Defendants in the said suit and from the frame of the suit, it does not appear that the contesting Defendants have any interest in the said suit or any right to be joined as a party. It was held that the drafting of the notice published has led to some misunderstanding and only the Badaves and Kolis can be parties to the suit. With this observation, the application was dismissed.

38. I have gone through the decision in Civil Suit No. 40 of 1929. In paragraph 17 of the said decision, the right of Jangams (the contesting Defendants) in respect to perform Dahibhat puja is considered and it has been held that it is not necessary to consider and decide the said point as it is a matter between Brahmins and Jangams. It holds that the only question involved being the right of Kolis to take Dahibhat of the puja performed by or through the Badaves. Thus, the Court was not considering the case of the rights of the Jangams to perform puja or take Dahibhat. In paragraph 23 therein, it has been held that the

Jangams have no connection with the Dahibhat puja performed by the Brahmins. This observation does not mean that the Jangams were not performing the puja and offering Dahibhat for and on behalf of the members of their community. It has further been held in the said judgment that the Jangams do not perform the daily worship of the deities. This also does not mean that the Jangams were not performing the puja or offering Dahibhat either on some occasions or on behalf of the members of their community. It is, thus, apparent that it was exclusively a dispute inter se between the Badaves and Kolis in respect of the performance of the religious rites and rituals which was involved in the Civil Suit No. 49 of 1929. It was a decree for permanent injunction passed specifically against the Kolis not to obstruct the Plaintiff-Badaves in their right of taking Dahibhat, Naivedya, Maha Naivedya, Ras of grain and Lakholi along with Guptadan and to give to devotees and pilgrims, Teerth, Prasad and Angars. Both the Courts below have concurrently held that neither the decision in the Civil Suit No. 49 of 1929 is binding upon the contesting Defendants nor any statement made in the deposition by a member of their community in the said proceedings.

39. In view of above, the appellate Court was right in holding that it was not a suit in a representative capacity as contemplated under Order-I Rule-8 of the Code of Civil Procedure, 1908 nor the bar of constructive res judicata under Explanation-VI of Section 11 of the Code operates against the contesting Defendants. The decisions of the Apex Court in the cases of R. Venugopal and Singhalal (supra) delivered on Order-I Rule-8 and Explanation-VI of section 11 of the Code are of no help. Similarly, the question of applying the ratio of the decision of the Apex Court in Tirumala Tirupati Devasthanams (supra) on section 13 of the Indian Evidence Act, 1872 and in the case of Ujagar Singh (supra) on section 57 of the Indian Evidence Act, 1872 does not at all arise.

40. It is the question of customary or traditional right in rem which the Plaintiff has claimed in the suit in question. In the decision of the Apex Court in the case of Booz Allen and Hamilton Inc. Vs. SBI Home Finance Ltd. and Others, a distinction is made out between right in rem and a right in personam, in para 37, which is reproduced below:

It may be noticed that the cases referred to above relate to actions in rem. A right in rem is a right exercisable against the world at large, as contrasted from a right in personam which is an interest protected solely against specific individuals. Actions in personam refer to actions determining the rights and interests of the parties themselves in the subject matter of the case, whereas actions in rem refer to actions determining the title to property and the rights of the parties, not merely among themselves but also against all persons at any time claiming an interest in that property. Correspondingly, judgment in personam refers to a judgment against a person as distinguished from a judgment against a thing, right or status and Judgment in rem refers to a judgment that determines the status or condition of property which operates directly on the property itself.

The right in rem, if established creates a duty against the world at large not to disturb it unless it is shown that the Defendants or any other person has made out a case of exception that they are not bound by such right of the Plaintiffs. In view of this, the contention of Mr. Thorat for the Plaintiffs that the contesting Defendants must prove custom in their favour to perform all such religious rites and rituals is accepted subject to a rider that it is for the Plaintiffs who have come before the Court to first prove their right in rem, as has been claimed. Once a right in rem is established on the basis of customary law, the perpetual injunction, as claimed, should follow in the absence of any custom being pleaded and proved by the contesting Defendants.

41. A custom is a long drawn, ancient, uniform, definite continuous and compulsory usage or practice which has been accepted followed and recognised by the members of community or religion interested in it. The custom has the effect of modifying the general personal law. But it does not override the statutory law unless the custom is expressly saved by it. No custom is valid if it is illegal, immoral, unreasonable or opposed to the public policy. The custom being in derogation of the general law, is required to be construed strictly. The party relying upon the custom is obliged to establish it by way of clear and unambiguous evidence. The evidence adduced on behalf of the party concerned, must prove the alleged custom and the proof must not be unsatisfactory or conflicting. A custom cannot be extended by analogy or logical process and it also cannot be established by a priori method. The decision of the Apex Court in the case of Laxmibai (Dead) thr. L.Rs. and Another Vs. Bhagwantbuva (Dead) thr. L.Rs. and Others, throws light on the aforesaid proposition. A claim for customary or traditional right in rem to perform the religious rites and rituals to the exclusion of any interference by others, as has been claimed in the present suit, carries with it a heavy burden of proof. In the light of these principles, I shall judge the findings of the Courts below and the evidence available on record.

42. In this suit or appeal, the simpliciter rights of the Plaintiffs to perform such religious rites and rituals is not disputed. The contesting Defendants accept such right of the Plaintiffs. According to them, they also have the right to perform all such religious rites and rituals for and on behalf of the members of their community. It is, therefore, a question of the right in rem to perform the religious rites and rituals for and on behalf of the members of all the communities of Hindus to the exclusion of all others. The learned Senior Counsel appearing for both the sides have taken me through the documentary and oral evidence on record. On going through the same, I do not find any documentary evidence constituting the source of the exclusive right of the Plaintiffs as claimed, which has been accepted and recognised by all others, including the contesting Defendants. There is neither any proof of any practice or usage nor of its acceptance or recognition as required by law. On the contrary the history of the litigation shows that the other communities have been obstructing the Plaintiffs in performance of such rights. Hence, the question of calling upon the contesting Defendants to prove their customary right does not at all arise. The Plaintiffs

have to stand on their own legs and not upon the weaknesses of the other side.

43. The Plaintiffs have placed on record voluminous documentary and oral evidence in support of their plea. The trial Court has held that the exclusive right of the Plaintiff to perform all such religious rites and rituals has been established on the basis of the oral evidence and the documents proved and marked as Exhibit-134 to 136, 138, 152, 154 to 158, 166, 168, 170, 171, 173, 174, 293, 296, 298, 309, 340 and 342. The trial Court has held that the documents at Exhibit-139 to 148, 151, 153, 165 and 167 have not been proved. In respect of the documents at Exhibit-150, 167, 307 and 308, the trial Court has held that the documents are proved but they are not relevant or material for deciding the controversy. The appellate Court has held that some of the documents which are held to be proved by the trial Court, namely, Exhibit-173 and 174 on the basis of section 90 of the Indian Evidence Act, 1872, were not admissible in evidence. The documents were not pleaded. The contents are not proved. Even if the documents are proved and held admissible in evidence, the finding of the appellate Court is that these documents nowhere disclose the source of exclusive right of the Plaintiffs to perform all such religious rites and rituals in the temple.

44. It is not necessary for me to discuss the findings recorded by the Courts below at length. Every thing is considered by the Courts below and it is not the case of non application of mind to any evidence on record. The findings of fact recorded by the appellate Court are based upon the appreciation of evidence and reading of these documents, and at any rate it is possible view of the matter which does not give rise to any substantial question of law for consideration.

45. Now coming to the last submission of Mr. Thorat that it is the Defendant No. 17, the owner of the temple, has the right to decide as to who should be allowed to perform the religious rites and rituals in the temple. At any rate, according to him, the evidence available on record clearly suggests that the Defendant No. 17 has granted permission to the Plaintiffs to perform such religious rites and rituals in the temples and there is specific refusal of such permission to the contesting Defendants. Be that as it may, it is significant to note that the suit in question has not been filed by the owners of the temple asserting their right to manage the affairs in a matter of religion under Article 26(b) of the Constitution of India. It is a legal battle between the two communities of Hindus, namely, Badaves and Jangams. It is not the case pleaded in the plaint that it is only by virtue of the permission granted by the Defendant No. 17 that the Plaintiffs have been performing such religious rites and rituals to the exclusion of other communities of Hindus. It is not the case pleaded or proved that performing of religious rights and rituals, as are claimed, constitute an essential part of the religion or religious practice and the Plaintiffs are only authorised by the Defendant No. 17, the owner to perform such rites and rituals. It is not the case that according to the tenets of religion, only the Badaves are well-versed and properly trained and qualified to perform the religious rites and rituals in a manner conducive and appropriate to worship of the deities and are the only persons authorised to enter

the sanctum sanctorum of the temples. In the absence of such a case being pleaded and proved, the documents at Exhibit-173 and 174 and other connected documents even if disclose the source of such right of the Plaintiffs, would not be enough to grant relief to the Plaintiffs as is claimed.

46. In view of the above, none of the substantial question of law at serial Nos. (i) to (iii) and (v) survive for consideration. The second appeal is, therefore, dismissed. There shall be no order as to costs.